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Federal Communications Commission
Office of the Secretary

Mr. Chad Breckinridge
Associate Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

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Re: Twilight Towers Discussion Meeting, Albuquerque, NM

Dear Mr. Breckinridge:

CTIA[®] and PCIA – The Wireless Infrastructure Association (“PCIA”) are pleased to respond to the Infrastructure Team’s (“Team”) email of February 3, 2016 to provide our members’ perspectives on the matter of Twilight Towers in general, and the points discussed at the FCC’s Discussion Meeting held on January 27-28, 2016 in Albuquerque, New Mexico (the “Discussion Meeting”). In addition, these comments convey our members’ views on key elements that must be contained in the Twilight Tower Solution. As national associations that represent wireless carriers and tower owners who build and maintain wireless infrastructure critical to the nation’s 21st century economy, security, and communications, we have a vital interest in the issues discussed at the meeting.¹ Indeed, CTIA and PCIA have steadfastly sought resolution of these very issues for years.

Before providing our input on the issues raised in the Discussion Meeting, CTIA and PCIA wish to express our appreciation for the FCC’s efforts to bring the key parties to the Section 106 process—the Advisory Council on Historic Preservation (“ACHP”), the National Association of Broadcasters, National Conference of Historic Preservation Officers (“NCSHPO”), multiple State Historic Preservation Officers (“SHPOs”), the Tribes and Tribal Historic Preservation Officers (“THPOs”), and the wireless industry—together in one room.

¹ CTIA[®] (www.ctia.org) represents the U.S. wireless communications industry. With members from wireless carriers and their suppliers to providers and manufacturers of wireless data services and products, the association brings together a dynamic group of companies that enable consumers to lead a 21st century connected life. CTIA members benefit from its vigorous advocacy at all levels of government for policies that foster the continued innovation, investment, and economic impact of America’s competitive and world-leading mobile ecosystem. The association also coordinates the industry’s voluntary best practices and initiatives and convenes the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C. PCIA – The Wireless Infrastructure Association is the principal organization representing the companies that build, design, own and manage telecommunications facilities throughout the world. Its over 230 members include carriers, infrastructure providers, and professional services firms.

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That in itself is historic, and it is CTIA's and PCIA's belief that the resulting discussion provided all the parties with a newfound understanding of each other's perspectives and challenges.

CTIA and PCIA opened our joint presentation at the Discussion Meeting saying that we came to the meeting to listen to everyone's perspectives as well as provide our own. We learned a lot, as each of the parties candidly spoke of their respective challenges and concerns. By the second day we believe the parties found significant common ground. To summarize, all parties agreed that Twilight Towers, rather than "Non-Compliant Towers," should be addressed, and that the Twilight Tower Solution should be expeditious without sacrificing the ability to entertain meaningful objections. Further, a consensus arose that the Twilight Tower Solution should be based on the tower-by-tower review presently undertaken by the FCC at a tower owner's request. In response to the concerns raised by some of the Tribes in attendance concerning consultants, our members stated that they would like to open up a channel of communications directly with Tribes so that such concerns could be efficiently addressed.

The Twilight Tower Solution Must Recognize Certain Elements and Attributes.

CTIA and PCIA are committed to working with the parties to the Discussion Meeting on a Twilight Tower Solution that balances the need for timely deploying infrastructure for critical wireless broadband deployment with the important goal of ensuring there are no adverse effects to culturally and historically significant lands. To achieve these twin goals, it is our belief that the Twilight Tower Solution should recognize the following:

- The Solution should be focused on Twilight Towers, not a broader category of "Non-Compliant Towers," since conflating the two groups would certainly cause confusion and delay.
 - Twilight Towers are a defined group of towers that were built between March 17, 2001 and March 7, 2005 (the "Twilight Tower Period") that could offer existing infrastructure platforms for collocation for broadband and public safety facilities. Once cleared, the tower owners have the internal resources to efficiently market these towers for collocation. Hence they provide the swiftest path to accomplishing the underlying policy objective of making infrastructure available for wireless broadband deployment.
 - "Non-Compliant Towers" as a group have not been defined and owners have not been identified, two factors that would certainly require substantial time and considerable effort to complete. We note that the participants at the Discussion Meeting even seemed uncertain on how to define "Non-Compliant Towers" and showed only a limited understanding of who owned these towers or where they are located.
 - Since so little is known about "Non-Compliant Towers," it is unclear how many are technically suitable for, or would otherwise be available for, collocation.

- Delaying consideration of the Twilight Tower Solution while questions as to ownership, numbers, and availability of “Non-Compliant Towers” are answered would have the unintended consequence of further delaying the availability of infrastructure for wireless broadband and FirstNet.
- A Twilight Tower Solution must recognize the unique regulatory conditions that fostered their creation.
 - By definition, Twilight Towers were built during the Twilight Tower Period, a four-year period during which both the ACHP and the FCC were attempting to adapt their rules to accommodate the unique challenge posed by rapid nationwide wireless build-out. These challenges included construction of a large number of towers, the imposition of FCC-imposed build-out deadlines, and the uncertainty that attended developing and implementing procedures that delegated significant parts of the Section 106 process to private contractors.
 - Plainly stated, the “regulatory muddle,” to use FCC Chairman Powell’s 2003 description of the Agency’s preservation compliance, must be recognized as a major contributing factor in any Twilight Tower Solution.² As PCIA and CTIA stated at the Discussion Meeting, Chairman Powell candidly admitted that the FCC was aware its rules were unclear and that the then-nascent Nationwide Programmatic Agreement (“2004 NPA”) was needed because it “seeks to clarify the regulatory muddle and delay that has beset many tower-construction proposals by defining key terms, establishing public-participation standards and describing how to submit projects to State Historic Preservation Officers.”³
 - CTIA and PCIA concur with the then-Chairman’s assessment. As we pointed out during the Discussion Meeting, until the FCC revised its Rules in 2005, Note 4 to Section 1.1307(a)(4) stated: “To ascertain whether a proposal affects a historic property of national significance inquiries *may* also be made to the appropriate State Historic Preservation Officer.”⁴ By using “may” rather than “shall,” the FCC made requesting SHPO review permissive rather than mandatory. In the FCC’s Order adopting the 2004 NPA, the FCC explicitly stated it was amending Section 1.1307(a)(4) “expressly to require that applicants follow the procedures set forth in the Council’s rules, as modified and supplemented by the Nationwide Agreement and the Collocation Agreement.”⁵ Elsewhere in the Order, in referring to the revised Section 1.1307(a)(4), the Commission stated: “The rule

² Statement of Chairman Michael K. Powell, *attached to Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Notice of Proposed Rulemaking, FCC 03-125, WT Docket No. 03-128 (rel. June 9, 2003).

³ *Id.*

⁴ 47 C.F.R. § 1.1307(a)(4), Note 4 (emphasis added).

⁵ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 18 FCC Rcd 11666, ¶ 168 (2004).

will bring administrative certainty by making it clear that the provisions of the Nationwide Agreement are mandatory and binding upon applicants”⁶

- Significantly, at about the same time Chairman Powell was speaking about the FCC’s regulatory shortcomings, the ACHP took note of deficiencies in its processes. In the opening pages of a new plan to deal with Tribal consultation, ACHP leadership was one of the key issues raised. Acknowledging “absences of leadership from the ACHP on what is required consultation,” the report spoke of “confusion and anger on all sides, even when Federal Agencies have attempted to engage in good faith consultation.”⁷
- The preceding citations could be reinforced with other evidence—such as the ACHP’s unsuccessful attempt to develop a Tribal consultation database, the three (2001- 2004) years that lapsed between PCIA and the United South & Eastern Tribes (“USET”) negotiating a best practice for Tribal consultation, and the FCC’s revision and acceptance of the document. PCIA and CTIA point to the historic record only as a means of recalling for the parties that the years before the 2004 NPA became effective was a time when all parties were struggling with wireless growth and the unanticipated implications for the Section 106 process. Despite everyone’s best efforts, a significant disconnect arose between the sea change occurring in the wireless infrastructure arena and the Section 106 regulations and guidance.
- Recognizing the need for clarity and certainty, the FCC, the ACHP, and the NCSHPO drafted the 2004 NPA, which significantly clarified how FCC wireless licensees and tower owners were to conduct a Section 106 review.
- A Twilight Tower Solution should also recognize changed ownership patterns and recordkeeping realities.
 - PCIA and CTIA believe that, in most instances, Twilight Towers are not owned today by their original owners. During the last decade, the industry has undergone far reaching reorganization and consolidation and welcomed new entrants. As a consequence, punitive measures are not only unjustified, but also will not impact the entity that built the tower. Further, after the Twilight Tower Period, two significant shifts occurred which obviate the need for punitive measures: 1) the FCC, the ACHP, and the NCSHPO signed the 2004 NPA which ushered in a clearly defined Section 106 process; and 2) as evidenced by the presentations made at the Discussion Meeting, tower owners have created comprehensive internal Section 106 compliance programs that integrated and implemented the 2004 NPA’s procedures.

⁶ *Id.* at ¶ 169

⁷ Advisory Council on Historic Preservation, *Action Plan on ACHP Native American Initiatives*, at 3 (Oct. 2003).

- CTIA and PCIA believe that, in many instances, the original Twilight Tower owners made an effort to comply with Section 106. As noted in our presentation given during the Discussion Meeting, confusion between the National Environmental Policy Act and Section 106 requirements seem to have been a factor in some cases. There is some evidence that in other cases consultation did occur but cannot be documented due to the fact that the FCC, SHPOs, and the original Twilight Tower owners did not maintain adequate records.⁸
- The FCC treatment of Twilight Towers should take into account the lack of evidence that these towers have had an adverse effect.
 - Twilight Towers have been in place for at least 11 years and some as long as 15 years.
 - Although we have asked the FCC and the ACHP to provide examples of or share the number of complaints it has received concerning towers from the Twilight Tower Period, no examples or data have been provided. The FCC must recognize the significant amount of time that has passed since Twilight Towers were constructed and the few, if any, complaints raised about them.
 - PCIA and CTIA observe that there has been ample opportunity for preservation advocates to point to adverse effects. Beginning with the 2001 Collocation Agreement, a procedure has been in place for SHPO/THPOs and the ACHP to call the Commission's attention to towers that pose an adverse effect. That procedure was repeated and strengthened in the 2004 NPA. The FCC's inability to provide evidence of complaints suggests that either preservationists have not

⁸ Neither the FCC nor the SHPOs have maintained records that denote whether a tower has or has not completed Section 106. In fact, as we heard during the Discussion Meeting from SHPOs, ACHP, and NCSHPO, SHPOs have long since purged their records of towers that received consent letters from SHPOs during the Twilight Tower Period. The fact that SHPOs routinely deleted their records of actions they took during the Twilight Tower Period accounts, at least in part, for the fact that preservation documentation is not routinely included in the documentation that accompanies towers when they are sold.

The lack of Twilight Tower ownership documents is the result of two major factors. First, the emphasis on the responsibility to keep records of consultation with SHPOs and Tribal Historic Preservation Officers was not clarified until the 2004 NPA was adopted. See 2004 NPA, Section VII.E. For example, Section VII.A. of the 2001 Collocation Agreement said only that "FCC licensees shall retain records of the placement of all licensed antennas, including collocations subject to this Nationwide Programmatic Agreement, consistent with FCC rules and procedures." See 2001 Collocation Agreement Section VII.A. The 2004 NPA delegates record keeping functions to the SHPO and THPO in Section VII.E, stating: "The SHPO/THPO shall, subject to applicable state or tribal laws and regulations, and in accordance with its rules and procedures governing historic property records, retain the information in the Submission Packet pertaining to the location and National Register eligibility of Historic Properties and make such information available to Federal agencies and Applicants in other Section 106 reviews, where disclosure is not prevented by the confidentiality standards in 36 C.F.R. § 800.11(c)." See 2004 NPA, Section VII.E.

The second factor—the fact that, since the Twilight Tower Period, many towers have been sold and resold—compounds the challenge of finding Twilight Tower documentation. Often, the original Twilight Tower owner is no longer in business, meaning the current Twilight Tower owner cannot ask the original Twilight Tower owner for missing documentation.

filed such complaints or that any such complaints have been dismissed. In either event, it strongly supports the hypothesis that, collectively, Twilight Towers do not adversely affect historic properties.

If Twilight Towers Are to be Expediently Used as Platforms for Wireless Broadband and FirstNet Facilities, the Twilight Tower Solution Must be Crafted As Follows to Further These Goals.

In light of the regulatory uncertainty that existed between 2001 and 2005, incomplete recordkeeping by all the parties to the Section 106 process, and the paucity of evidence that any Twilight Tower adversely affects a historic property, it is essential that the Twilight Tower Solution take a tower-by-tower approach and contain the following elements:

- The Twilight Tower Solution must not exact a penalty upon current Twilight Tower owners (e.g., no general mitigation fund).
- The Twilight Tower Solution should be voluntary, allowing the tower owner to submit the tower for review as market conditions make the tower a candidate for collocation and—consistent with the current requirement—any and all collocations on Twilight Towers that are not submitted for such review would have to undergo Section 106 review.
- The Twilight Tower Solution should utilize the same processes and systems currently used for new and modified towers (e.g., FCC Forms 620 or 621, TCNS, E-106, same consulting parties).
- The FCC should ask the ACHP to direct SHPOs and THPOs to promptly comment on such towers as part of the ACHP's responsibility to oversee the Section 106 process.⁹ The ACHP has the authority to do so and has previously taken similar action when warranted. For example, in 2001 the ACHP issued guidance to SHPOs and THPOs concerning delegation of the responsibilities for initial phases of the Section 106 process.¹⁰ Moreover, ACHP action is essential to ensure that SHPOs and THPOs are

⁹ Some SHPOs and THPOs do in fact comment on undocumented built towers or collocations on such towers, but it is uncertain as to how many do so and how consistent they are in doing so. PCIA and CTIA members report that about 80 percent of SHPOs refuse to review built towers, whereas the number that refuse to review collocations is probably smaller. In a 2012 conversation Atchley Harden Lane, LLC had during preparation of a review of SHPO attitudes towards DAS/Small Cell deployment, about half of the 23 SHPOs that were consulted indicated they would comment on collocations on undocumented built towers. In some instances, SHPOs have published their policies. See, e.g., MICHIGAN STATE HISTORIC PRESERVATION OFFICE, SECTION 106 CONSULTATION GUIDELINES FOR CELLULAR COMMUNICATIONS PROJECTS, available at http://www.arch-res.com/pdf_files/MichiganCellTower.pdf (last visited Feb. 15, 2016); *Telecommunication Tower 106 Review*, SC DEPARTMENT OF ARCHIVES AND HISTORY, STATE HISTORIC PRESERVATION OFFICE, <http://shpo.sc.gov/programs/revcomp/Pages/Tower106process.aspx> (last visited Feb. 16, 2016). However, most have not.

¹⁰ Memorandum from John Fowler, Executive Director, ACHP, to FCC, State Historic Pres. Officers, Tribal Historic Pres. Officers, regarding Delegation of Authority for Section 106 Review of Telecommunications Projects (Sept. 21, 2000).

consistent in the application of Section 106, as the Historic Preservation Fund Grant to both SHPOs and THPOs requires consistency.¹¹

The Tower-by-Tower Approach Detailed Above Addresses the Issues Raised at the Discussion Meeting.

The Twilight Tower Solution presented by CTIA and PCIA addresses a number of the concerns that were raised during the Discussion Meeting by SHPOs and Tribes. In particular, the Solution:

- Avoids a chief concern of the SHPOs, Tribes, and tower owners; namely, that a sudden influx of Twilight Towers into the Section 106 process would overburden their resources. In fact, the Solution proposed herein can be accomplished with no increase, or only a minimal increase, in workload. Opening a Twilight Tower to collocation essentially removes the need for one or more new towers and hence should lead to no net increase in the number of SHPO and Tribal reviews.
- Preserves the opportunity for meaningful public comment, SHPO and Tribal review, and tower-specific mitigation. Since Twilight Towers would follow the same review process as a new tower, the Solution will afford SHPOs and Tribes the opportunity to object to a specific Twilight Tower that has an adverse effect as those towers are considered. The Solution would not alter any party's ability, pursuant to the 2004 NPA, to object to a Twilight Tower that is not submitted for review.
- Retains the current notification process. Since Twilight Towers that utilize the Solution will follow the existing tower-by-tower review process as though they were new towers, Tribes will be notified of a Twilight Tower that is available for review and may charge *reasonable* fees for Tribal review.
- Is straightforward and easy to implement. The Twilight Tower Solution introduces no new procedures, but instead relies on existing procedures (e.g., Forms 620 and 621) and tools (e.g., TCNS).
- Has the potential to make Twilight Towers available for collocation in a timely manner so that FirstNet and other broadband providers may utilize the Solution to swiftly deploy new infrastructure.
- Furthers important historic preservation goals. By reducing the need for new towers, the adverse effects those towers could have on historic properties are forestalled.

¹¹ See NAT'L PARK SERV., HISTORIC PRESERVATION GRANTS MANUAL, CHAPTER 6, GRANT ASSISTED PROGRAM ACTIVITIES, 34-36 (2007), available at http://www.nps.gov/preservation-grants/manual/HPF_Manual.pdf. The Grant requires "[t]he review of, and comment on, proposed Federal or federally funded, licensed, permitted, or *approved undertakings*" and directs that "the Secretary of the Interior's 'Standards for Archeology and Historic Preservation' must be consistently applied by States in evaluating products sent to states pursuant to agreements with Federal Agencies." See *id.* at 36 (emphasis added).

The Tower-by-Tower Approach Described Above Obviates the Need for a General Mitigation Fund, Thus CTIA and PCIA Would Oppose Any Effort to Create One.

If the Commission were to adopt a tower-by-tower Solution as recommended by CTIA and PCIA, there would be no need for a general mitigation fund. In our Twilight Tower Solution, each tower would be subjected to review and comment and, if any tower were determined to have an adverse effect, mutually agreeable specific mitigation measures could be instituted. This approach honors the underlying principle of mitigation, which presumes the impact to the affected historic site is what needs to be addressed.¹²

At the Discussion Meeting, it was suggested that by not originally submitting Twilight Towers to Section 106 review, the Twilight Tower owner failed to comply with Section 106, and "saved" time, money, and effort, and thus a general mitigation fund was warranted. These notions are misguided and the underlying rationale fails when the facts surrounding Twilight Towers are considered. First, as we stated at the Discussion Meeting, given the regulatory muddle surrounding Twilight Towers, the original tower owners could have reasonably concluded that they complied with the regulations then in effect. Second, there was no cost savings realized because a) the Twilight Tower owner had to forego a decade of collocation rental fees; and b) under the Solution, the current owner will have to incur the same costs that the original Twilight Tower owner "saved." Second, the general mitigation fund concept cannot be justified as having a deterrent effect on the original Twilight Tower owners, as the vast majority of them no longer own Twilight Towers.

Further, for the reasons discussed above, Twilight Towers are not analogous to the towers deployed for Positive Train Control. Importantly, and different from Twilight Towers, the Section 106 rules were clarified by the implementation of the 2004 NPA long before Positive Train Control sites were constructed without completing the Section 106 review process.

* * * * *

CTIA and PCIA appreciate the FCC's efforts to bring together all the parties involved in the Section 106 process and believe that significant progress was made toward a Twilight Tower Solution as a result of the Discussion Meeting. CTIA and PCIA believe that future dialogue between the wireless industry and Tribes would lead to both a better understanding of each other's needs and resolution of other Section 106 issues.

¹² We also note that Part 800 does not provide for a general mitigation fund. Rather, it focuses the parties on restoring adversely affected historic properties. See 36 C.F.R. § 800.

Sincerely,

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